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No. 97-185

# In the Supreme Court of the United States

OCTOBER TERM, 1996

NEW BREED LEASING CORPORATION, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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19 pp

## QUESTION PRESENTED

Whether the National Labor Relations Board may remedy a successor employer's unlawful refusal to hire its predecessor's employees and to bargain with their unions by ordering the employer to reinstate those employees, to engage in bargaining with the unions, and to adhere to the previous terms and conditions of employment during the bargaining process.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-27) is reported at 111 F.3d 1460. The decisions and orders of the National Labor Relations Board (Pet. App. 28-36) and the administrative law judge (Pet. App. 36-101, 102-128) are reported at 317 N.L.R.B. 1011.

### JURISDICTION

The judgment of the court of appeals was entered on April 30, 1997. The petition for a writ of certiorari was filed on July 29, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner received a subcontract to operate a United States Army freight station and vehicle processing facility in Compton, California. A series of other private employers had previously operated the facility and had recognized locals of the International Longshoremen's and Warehouseman's Union (the unions) as the collective-bargaining representatives of their employees. Petitioner's immediate predecessor, Maersk Pacific Limited, had employed 12 persons at the facility. Maersk was a member of the Pacific Maritime Association (PMA), a multi-employer organization that represents its members in negotiating and administering collective bargaining agreements with the unions. The unions represented the 12 employees, who worked under union contracts. Pet. App. 2, 41-44.

Before submitting its bid for the subcontract, petitioner had contacted the PMA and had secured membership applications and other materials, including copies of PMA's current collective-bargaining agreements. Pet. App. 46. In its bid, petitioner stated that "[c]onversations have been initiated and provision made to work with" PMA in obtaining "both long-term and occasional workers" and that "[m]embership in PMA assures the experience level of the work force and simplifies personnel administration." *Id.* at 45. Thereafter, petitioner submitted a membership application to PMA, together with a $1,000 application fee. *Id.* at 3, 46.

After receiving notice that its bid for the subcontract was successful, petitioner gave repeated assurances to union representatives and individual employees that the current work force at the facility would

be retained. Pet. App. 47, 49-53, 56-57, 68-70. Nonetheless, petitioner began to run anonymous employment advertisements in the local newspaper, soliciting outside job applicants. Petitioner screened the outside applications it received and interviewed applicants at a local hotel. Petitioner did not notify the unions and the current employees of those employment solicitations. *Id.* at 4, 51-52, 55, 77-80.

After conducting the outside interviews, petitioner notified the Army and the unions that it did not intend to retain the current employees. At about the same time, petitioner determined not to complete its membership agreement with PMA and hired its work force from the outside applicants. Pet. App. 55-56, 58-59. When petitioner began operation of the facility, it unilaterally established the employees' terms and conditions of employment and refused to recognize or bargain with the unions. *Id.* at 59-60.

2. The unions filed unfair labor practice charges against petitioner. Pet. App. 37. The Regional Director of the National Labor Relations Board, on behalf of the Board's General Counsel, issued administrative complaints on the charges, alleging that petitioner had violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), (3), and (5), by discriminating in hiring against the predecessor's employees, refusing to recognize and bargain with the unions, and unilaterally setting the employees' terms and conditions of employment. Pet. App. 37-38.

3. While the administrative complaints were pending, the Regional Director petitioned the United States District Court for the Central District of California for temporary injunctive relief under Section 10(j) of the National Labor Relations Act, 29 U.S.C. 160(j). The district court granted the Regional Director's

request for an order requiring petitioner to offer full reinstatement to the predecessor's employees, restore the preexisting terms and conditions of employment, and recognize and bargain with the unions. Pet. App. 132-136. The court of appeals concluded that an injunction was appropriate, but it found no need to order an interim restoration of preexisting terms and conditions of employment, noting that if the Board ultimately found that petitioner had committed the unfair labor practices alleged, the Board could "fashion a back pay award to remedy that harm." *Id.* at 130-131.

4. Following a hearing on the merits of the Regional Director's administrative complaints, an administrative law judge (ALJ) found that petitioner had excluded the predecessor's employees from hiring to avoid a bargaining obligation with the unions, thereby violating Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (3). Pet. App. 75-84. The ALJ additionally found that petitioner would have hired the predecessor's employees but for its desire to avoid bargaining with the unions and that petitioner's refusal to recognize and bargain with the unions and its unilateral changes in terms and conditions of employment therefore violated Section 8(a)(1) and (5), 29 U.S.C. 158(a)(1) and (5). Pet. App. 87-88.

5. The National Labor Relations Board affirmed the ALJ's findings and conclusions. Pet. App. 28-36. Because the evidence showed that petitioner refused to hire the predecessor's employees based on its desire to avoid bargaining obligations, the Board agreed with the ALJ that petitioner "was not free to change the prevailing terms and conditions of employment unilaterally." *Id.* at 29 n.3. The Board

essentially adopted the ALJ's recommended order, *id.* at 29-31, which directs petitioner to offer reinstatement to the predecessor's employees; to give them back pay and other make-whole relief; to bargain with the unions; and to restore the previous terms and conditions of employment until petitioner "negotiates in good faith with the Unions to agreement or to impasse," *id.* at 94-96.[1]

6. The court of appeals affirmed the Board's unfair labor practice findings and enforced the Board's order. Pet. App. 1-27. The court specifically approved the provisions of that order directing petitioner to restore the preexisting terms and conditions of employment and to make the employees whole for petitioner's unilateral changes. *Id.* at 13-18, 96. It rejected petitioner's threshold contention that the court's disapproval of some of the terms of the temporary restoration order in the Section 10(j) injunction established "law of the case" that precluded the Board from employing those terms in its final restoration order. *Id.* at 13-15.

The court agreed with the Board's rationale that the parties must be restored to the status quo ante as a predicate for bargaining. The employees were therefore entitled to reinstatement under appropriate terms and conditions of employment. Because petitioner had wrongfully refused to hire the employees or bargain with their unions, petitioner bore the burden of proving that, had it done so, it "would not have agreed to the wage scale provided by the

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[1] The Board reserved to future compliance proceedings the issue of how many employees would be entitled to reinstatement and back pay. It modified the ALJ's recommended order to make clear that limitation. Pet. App. 29 & n.4.

predecessor's labor agreement, and the resulting impasse would have resulted in reduced wages." Pet. App. 15-18. The court concluded that, because petitioner had failed to satisfy that burden, "the Board's grant of back pay based on the predecessor's [u]nion pay scale restores as nearly as possible the employment situation that would have occurred absent [petitioner's] discrimination against the Union employees." *Id.* at 18.

Judge O'Scannlain agreed that petitioner had committed unfair labor practices, but dissented from the court's enforcement of the Board's remedy. Pet. App. 19-27. In his view, the law of the case doctrine prevented the Board from employing a remedy in its final restoration order that the court of appeals had not allowed in the Section 10(j) proceeding for a temporary injunction. *Id.* at 19-20. Judge O'Scannlain also concluded that the Board's remedy was inconsistent with a successor employer's normal privilege to set initial terms and conditions of employment. *Id.* at 22-25.

## ARGUMENT

The court of appeals properly affirmed the Board's exercise of remedial discretion in this case. Contrary to petitioner's contentions, the court's decision does not conflict with any decision of this Court or another court of appeals. The decision, which affirms a Board remedy based on the particular facts of the unfair labor practices at issue here, does not present any issue of general importance warranting this Court's review.

1. Petitioner contends (Pet. 13-17) that the court of appeals' decision directing petitioner to restore its predecessor's terms and conditions of employment

pending bargaining is "[i]rreconcilable" with this Court's decisions in *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970), and *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972). That contention is incorrect. This Court ruled in *H.K. Porter* that the Board may not compel an employer to adopt terms of a collective bargaining agreement that the employer has rejected in the collective bargaining process. 397 U.S. at 107-109. Applying that principle, the Court ruled in *Burns* that, while a successor employer may be under an obligation to bargain collectively with the union representing its predecessor's employees, the Board may not compel the successor to adopt a predecessor's collective-bargaining agreement. 406 U.S. at 281-291. See also *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27 (1987).[2]

Those well established principles are not at issue here. In this case, petitioner pursued a discriminatory hiring scheme specifically to avoid creating any bargaining obligations that would result from hiring its predecessor's employees. By doing so, it committed unfair labor practices in violation of the

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[2] The Court ruled in *Burns* that a successor is ordinarily free to establish its initial terms and conditions of employment, without bargaining with the union, because the union's majority will not be established until the successor hires a majority of its work force from the predecessor's employees. 406 U.S. at 292-296. The Court indicated, however, that an exception may exist when "it is perfectly clear that the new employer plans to retain all of the employees in the unit"; in that setting, it may "be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." *Id.* at 294-295. See *Fall River Dyeing & Finishing Corp.*, 482 U.S. at 47 n.14.

National Labor Relations Act. Pet. 3, 15, 17. As part of the remedy for those violations, the Board ordered petitioner to bargain in good faith with the employees' representatives until an agreement or an impasse in bargaining is reached. The Board additionally ordered that petitioner, on request of the employees, must restore the predecessor's terms and conditions of employment *during that bargaining process*. See Pet. App. 96.

Contrary to petitioner's argument, the Board's order does not impose a collective-bargaining agreement on petitioner in violation of *H.K. Porter* and *Burns*. The restoration provision is a "temporally limited" requirement to restore the status quo that existed before petitioner committed the unfair labor practice. *NLRB* v. *Staten Island Hotel Ltd. Partnership*, 101 F.3d 858, 862 (2d Cir. 1996). It reinstates the predecessor's terms and conditions of employment only as a predicate for bargaining. Petitioner is free, through fulfillment of its bargaining obligation, to reach a different agreement with the employees or to reach a good faith impasse. In either event, petitioner would not be bound to maintain the predecessor's terms. See Pet. App. 96.

The Board's order also does not infringe on a successor employer's normal right to set initial employment terms in the course of nondiscriminatory hiring. See *Burns*, 406 U.S. at 292-296. The Board took remedial action in response to petitioner's violation of its bargaining obligations, and it fashioned a remedy that sought to restore the collective bargaining environment that would have prevailed if petitioner had not violated the law. In formulating that remedy, the Board had to determine the situation that would have existed in the absence of petitioner's

unlawful conduct. The Board properly concluded that petitioner, as the wrongdoer, bore the burden of any uncertainty over the bargaining environment that would have existed if it had not engaged in illegal acts. See, *e.g.*, *Staten Island Hotel Ltd. Partnership*, 101 F.3d at 862.

As the court of appeals explained, the record in this case was "devoid of any evidence that the employees' wages would have changed had [petitioner] initially recognized and bargained with the Unions." Pet. App. 18. The Board therefore selected the predecessor's terms and conditions of employment as the best estimation of the status quo ante. The Board did not impose a "punitive" remedy (Pet. 17). It simply sought to restore the situation, to the extent possible, to the one that would have prevailed but for the violations. See *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 194 (1941). In doing so, the Board appropriately exercised its remedial discretion. See generally *Virginia Elec. & Power Co.* v. *NLRB*, 319 U.S. 533, 539-540 (1943) (Board's order must stand unless it represents "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act"); *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969); *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 216 (1964).

2. Petitioner contends (Pet. 18-21) that the court of appeals' decision in this case conflicts with decisions of other courts of appeals. That contention is incorrect. The courts of appeals have uniformly upheld the Board's imposition of similar restoration remedies in cases in which a successor has discriminated in hiring, based on anti-union animus, to avoid a bargaining obligation.

Seven courts of appeals have ruled that, when an employer has engaged in hiring discrimination to avoid a successorship obligation, the Board may appropriately remedy that violation by requiring the successor to reinstate the predecessor's terms and conditions of employment until the successor bargains in good faith with the union to agreement or impasse. See *NLRB* v. *Horizons Hotel Corp.*, 49 F.3d 795, 806 (1st Cir. 1995); *NLRB* v. *Staten Island Hotel Ltd. Partnership*, 101 F.3d 858, 861-862 (2d Cir. 1996); *Systems Management, Inc.* v. *NLRB*, 901 F.2d 297, 306-307 (3d Cir. 1990); *American Press, Inc.* v. *NLRB*, 833 F.2d 621, 624-625 (6th Cir. 1987); *U.S. Marine Corp.* v. *NLRB*, 944 F.2d 1305, 1319-1324 (7th Cir. 1991) (en banc), cert. denied, 503 U.S. 936 (1992); *Pace Industries, Inc.* v. *NLRB*, 118 F.3d 585, 593-594 (8th Cir. 1997); *Kallmann* v. *NLRB*, 640 F.2d 1094, 1102-1103 (9th Cir. 1981).[3]

Petitioner's assertion of a conflict rests, in primary part, on decisions that deal with a different issue arising from a qualification that this Court

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[3] In *Kallmann*, the court agreed with the Board that "the employer should not be permitted to benefit from his illegal conduct" and therefore could be required retroactively to apply the predecessor's terms. 640 F. 2d at 1103. The court, however, concluded that the backpay period should be limited, in light of evidence that the employer "would not have agreed to union demands to pay the higher rate." *Ibid.* As explained above, the court of appeals found no such evidence here. The Sixth Circuit's decision in *Armco, Inc.* v. *NLRB*, 832 F.2d 357, 365 (1987), cert. denied, 486 U.S. 1042 (1988), which petitioner cites (Pet. 21), is similarly distinguishable. In that case, the court remanded a backpay order for further consideration because of the court's concern that, as in *Kallmann*, the facts indicated the successor would never have agreed to the predecessor's terms.

attached to its successor employer ruling in *Burns*. The Court stated in *Burns* that when "it is perfectly clear that the new employer plans to retain all of the employees in the unit," it may "be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." 406 U.S. at 294-295. See note 2, *supra*. Petitioner mistakenly suggests that decisions dealing with that particular circumstance conflict with the situation presented here, in which petitioner committed unfair labor practices precisely to avoid hiring its predecessor's employees.

For example, petitioner argues (Pet. 18-19) that the court of appeals' decision here conflicts with *NLRB* v. *Spruce Up Corp.*, 529 F. 2d 516 (4th Cir. 1975), enforcing mem. 209 N.L.R.B. 194, 195 (1974), and *International Association of Machinists* v. *NLRB*, 595 F.2d 664, 671-676 (D.C. Cir. 1978), cert. denied, 439 U.S. 1070 (1979). In each of those cases, the courts of appeals upheld the Board's conclusion that successor employers who expressed a willingness to hire the predecessors' employees, but stated from the outset that the terms of employment would be different, were not required to bargain over the initial employment terms.[4] Those cases do not involve review of the

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[4] Contrary to petitioner's suggestion (Pet. 19 n.9), the Board's decision here does not rest on *Spruce Up*. Rather, the ALJ merely noted as background, in his discussion of the timing of a successor employer's bargaining obligation, that the "Board discusses these timing issues and their consequences in *Spruce Up Corp.*" Pet. App. 87. Accordingly, the divergent opinions of the Board members on *Spruce Up*, to which petitioner refers (Pet. 19 n.9), citing *Canteen Corp.* v. *NLRB*, 103 F.3d 1355, 1359-1360, 1362 (7th Cir. 1997), are irrelevant here.

Board's discretion to impose a remedy in response to a successor employer's use of unfair labor practices to avoid a bargaining obligation. They therefore are not in conflict with the court of appeals' decision here.[5]

Petitioner also contends (Pet. 19-21) that the court of appeals' decision conflicts with *Systems Management, Inc.* v. *NLRB*, *supra*, and *NLRB* v. *Staten Island Hotel Ltd. Partnership*, *supra*. Those decisions, however, actually support the propriety of the Board's restoration order. In *Systems Management*, the court approved the restoration of preexisting terms of employment as part of the backpay remedy for the predecessor's employees who were improperly denied jobs. 901 F.2d at 307-308. The court merely refused to extend the remedy to the employees hired in their stead who were not financially injured by the discrimination against the former employees, *ibid.*, and declined to order compliance with the backpay award

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[5] The same distinction applies to *Nazareth Regional High School* v. *NLRB*, 549 F.2d 873 (2d Cir. 1977). The court held in that case that a successor employer that had originally indicated an intent to retain the predecessor's employees, without stipulating new employment terms, had not clearly indicated an intention to be bound by the predecessor's terms and thus was free unilaterally to change those terms. *Id.* at 881-882. Petitioner seems to suggest (Pet. 20) that *Nazareth Regional High School* is similar to the present case because it involved "inherently coercive" Section 8(a)(1) violations, 549 F.2d at 878-879. That comparison is unsound. The unfair labor practices at issue in that case are not the equivalent of a discriminatory hiring scheme to evade bargaining, which provided the basis for the particular form of relief that the Board provided here. The same is true of the unlawful Section 8(a)(2) assistance to a rival union in *Burns*, 406 U.S. at 276, on which petitioner also relies (Pet. 16).

until the Board had determined the duration of the backpay period and the specific amounts of back pay due, *id.* at 308-309. In *Staten Island*, the court of appeals affirmed the same type of "temporally limited" restoration order that the Board employed in this case. Compare *Staten Island*, 101 F.3d at 862, with Pet. App. 17.

Petitioner also relies on the dissenting opinion in *U.S. Marine Corp.*, 944 F.2d at 1327-1331. Significantly, the dissent acknowledged that the Board could resolve against the wrongdoing employer "all factual ambiguities created by its illegal conduct," 944 F.2d at 1329, but concluded, on the facts of that case, that it was "unimaginable" that the employer would have agreed to use the preexisting terms. *Id.* at 1330. In this case, by contrast, the court of appeals found the record "devoid" of evidence that petitioner "would not have agreed to the [predecessor's] wage scale" had it hired the predecessor's employees on a nondiscriminatory basis and bargained in good faith with the Unions about the employment terms. Pet. App. 15, 18.[6]

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[6] The dissent in *U.S. Marine* also concluded that the Board's order was a "penalty," rather than a remedy (944 F.2d at 1330), based on the Board's statement that the successor had "forfeited any right [it might] have had as a successor to impose initial terms." 293 N.L.R.B. 669, 672 (1989). No such language appears in the Board's decision here. Pet. App. 28-29, 84-88. In any event, the Board's statement in *U.S. Marine* is consistent with its holdings in this and like cases that, since the successor's unlawful conduct made it impossible to determine what terms the predecessor's employees would have received absent the successor's unlawful scheme to avoid bargaining with the union, it was necessary to return to the status quo ante and send the parties to the bargaining table. The majority

3. Petitioner's contention (Pet. 21-23) that the Board's approach in this case will inhibit business transfers is without merit. The Board's approach does not raise "enormous practical obstacles for employers attempting to revitalize failing businesses or compete with uncompetitive ones" (Pet. 21). A new employer is free to offer its new employees the initial terms it chooses and to hire the employees it chooses, so long as it does not engage in illegal activity. The remedy at issue in this case comes into play only in the unusual situation in which the employer unlawfully discriminates against its predecessor's employees. The holding does not imperil lawful business transfers; it simply addresses the unique remedial problems raised when an employer such as petitioner embarks on a calculated scheme to evade bargaining with a union through discriminatory refusals to hire.

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of the court in *U.S. Marine* so understood the Board's rationale. 944 F.2d at 1322-1324.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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